A

Kathavarayan a/l Munisamy v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–95 OF 2003
MOHD GHAZALI, LOW HOP BING AND VINCENT NG JJCA
2 SEPTEMBER 2008

C

Criminal Law — Dangerous drugs — Trafficking — Appeal — Whether trafficking proved — Whether others had access to car in which drugs were found — Whether information admitted as evidence under s 27 of the Evidence Act 1950 was inadmissible evidence

D

Evidence — Information leading to fact discovered — Admissibility of statement — Whether information admitted as evidence under s 27 of the Evidence Act 1950 was cautioned statement — Whether information rendered inadmissible by failure to hold trial within a trial

E

The police received an information to the effect that an Indian man driving a Proton Saga motorcar bearing registration No PBR 5368 ('the car') could be carrying drugs in the car. Acting upon this information, a group of police personnel tailed and stopped the car, which was driven by the appellant, along Jalan Tunku Abdul Halim, Alor Setar. At the time when the police stopped the car there were no passengers in the car. The police officer in charge of the operation ('the officer') thereafter identified himself to the appellant and administered the caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('the Act'). The officer then asked the appellant whether he was carrying anything illegal, to which the appellant answered in the affirmative. Upon being asked whether he could show where the illegal thing that was kept in the car the appellant took a plastic bag hidden under the driver's seat and handed it to the officer. The plastic bag was found to contain a compressed slab of plant material which was later confirmed to be 937.8g of cannabis as defined under s 2 of the Act. The appellant was subsequently charged in court with the offence of trafficking in the said dangerous drugs under s 39B(1)(a) of the Act. During the trial the prosecution sought to admit the information given by the appellant about the existence of the illegal substance that was concealed under the driver's seat under s 27 of the Evidence Act 1950 ('EA'). As the appellant did not object to the admission of this information as evidence, the evidence formed part of the case for the prosecution. At the close of the case for the prosecution, the trial judge found that the prosecution had made out a prima facie case against the appellant on

F

G

H

I

the charge of trafficking and called upon the appellant to enter his defence. The defence was a mere denial. The appellant who claimed to use the car as a pirate taxi testified that on the day of his arrest he had ferried passengers in his car and that he was on his way to a relative's house when he was stopped by the police. By way of this explanation the appellant sought to prove that others had access to the car namely the four passengers he had carried. He also denied having been questioned by the police as to whether he was carrying anything illegal in his car and as to having been administered the caution under s 37A(1)(b) of the Act. The appellant instead claimed that he never showed to the police officer the package that was found under the driver's seat. At the conclusion of the trial the appellant was convicted of the charge of trafficking. This was the appellant's appeal against that decision. In his grounds of appeal the appellant submitted that the trial judge failed to consider the fact that others had access to the car and that the evidence admitted under s 27 of the EA was actually a cautioned statement and since no trial within a trial was held in admitting this evidence it remained inadmissible evidence, even though the appellant did not object to its admission.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The appellant's claim that he was using the car as a taxi only came about during the defence case and there were no merits with regard to this claim. There was a lack of cross-examination of witnesses with regard to this claim during the prosecution's case and this line of defence was only suggested for the first time when the defence was called. In any case, the trial judge did not dismiss the appellant's claim that he was a pirate taxi driver but merely rejected the defence claim about the possibility of a passenger placing the plastic bag containing the dangerous drugs under the driver's seat (see para 15).

(2) The information given by the appellant, an accused in custody, was given before the plastic bag containing the dangerous drugs was taken from the driver's seat where it was concealed and handed to the police. It was a record of the information given by the appellant in his own statement and the prosecution had made it clear that they were admitting the evidence pursuant to s 27 of the EA. In the light of decided cases it was clear that the trial judge was correct in ruling that this evidence was admissible and hence formed part of the prosecution's case (see paras 17–19 & 22).

(3) The evidence before the trial judge showed that the appellant was clearly in possession of the dangerous drugs and this fact denoted that the dangerous drugs were in his custody and control. This would trigger the statutory presumption of trafficking as provided in s 37(da) of the

Act. In the circumstances the trial judge was correct in calling upon the appellant to enter his defence at the close of the case for the prosecution. As the appellant failed to cast a reasonable doubt he was found guilty and convicted on the charge of trafficking. There was no reason to disturb the findings of the trial judge (see para 23).

[Bahasa Malaysia summary

Pihak polis menerima maklumat berkenaan seorang lelaki berbangsa India memandu sebuah kereta Proton Saga yang mempunyai nombor pendaftaran PBR 5368 ('kereta tersebut') mungkin membawa dadah di dalam kereta tersebut. Bertindak berdasarkan maklumat ini, sekumpulan anggota polis mengekori dan memberhentikan kereta tersebut, yang dipandu oleh perayu, di Jalan Tunku Abdul Halim, Alor Setar. Pada masa polis memberhentikan kereta tersebut tidak terdapat penumpang di dalamnya. Pegawai polis yang mengetuai operasi tersebut ('pegawai tersebut') kemudiannya memperkenalkan dirinya kepada perayu dan mengenakan amaran di bawah s 37A(1)(b) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pegawai tersebut kemudiannya bertanya kepada perayu sama ada dia membawa sebarang benda yang salah di sisi undang-undang, yang mana perayu mengiyakannya. Setelah ditanya sama ada dia dapat menunjukkan di mana benda yang salah di sisi undang-undang tersebut disimpan di dalam kereta tersebut perayu mengambil satu beg plastik yang tersembunyi di bawah tempat duduk pemandu dan menyerahkannya kepada pegawai tersebut. Plastik beg tersebut didapati mengandungi satu ketulan mampat bahan tumbuhan yang kemudiannya disahkan sebagai kanabis seberat 937.8g seperti yang ditafsirkan di bawah s 2 Akta tersebut. Perayu kemudiannya dituduh di mahkamah dengan kesalahan mengedar dadah berbahaya tersebut di bawah s 39B(1)(a) Akta tersebut. Semasa perbicaraan pihak pendakwaan memohon untuk memasukkan maklumat yang diberi oleh perayu mengenai kewujudan bahan yang salah di sisi undang undang tersebut yang tersembunyi di bawah tempat duduk pemandu di bawah s 27 Akta Keterangan 1950 ('AK'). Memandangkan perayu tidak membantah kepada kemasukan maklumat ini sebagai keterangan, keterangan tersebut membentuk sebahagian kes kepada pendakwaan. Di akhir kes pendakwaan, hakim perbicaraan mendapati pendakwaan telah membuktikan kes prima facie terhadap perayu di atas pertuduhan mengedar dan memanggil perayu untuk memasukkan pembelaan. Pembelaan tersebut hanyalah satu penafian. Perayu yang mendakwa menggunakan kereta tersebut sebagai teksi sapu memberi keterangan bahawa pada hari dia ditahan dia telah membawa penumpang-penumpang di dalam keretanya dan bahawa dia di dalam perjalanan ke rumah saudara apabila dia diberhentikan oleh polis. Melalui penjelasan ini perayu memohon untuk membuktikan bahawa orang lain mempunyai peluang memasuki kereta tersebut iaitu empat penumpang yang

dibawanya. Dia juga menafikan disoal oleh pihak polis sama ada dia membawa apa-apa bahan yang salah di sisi undang-undang di dalam keretanya dan diberi amaran di bawah s 37A(1)(b) Akta tersebut. Perayu sebaliknya mendakwa dia tidak pernah menunjukkan kepada pegawai polis tersebut bungkusan yang dijumpai di bawah tempat duduk pemandu. Di akhir perbicaraan tersebut perayu disabitkan dengan pertuduhan mengedar. Ini adalah rayuan perayu terhadap keputusan tersebut. Di dalam alasan pembelaannya perayu mengemukakan bahawa hakim perbicaraan telah gagal menimbangkan fakta yang orang lain mengguna kereta tersebut dan bahawa keterangan yang dimasukkan di bawah s 27 AK adalah sebenarnya satu pernyataan amaran dan memandangkan tiada perbicaraan di dalam perbicaraan diadakan dalam memasukkan keterangan ini ia kekal sebagai keterangan yang tidak boleh diterima, walaupun perayu tidak membantah kepada kemasukannya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Dakwaan perayu bahawa dia menggunakan kereta tersebut sebagai teksi hanya timbul semasa kes pembelaan dan tidak terdapat merit berkenaan dakwaan ini. Terdapat kekurangan pemeriksaan balas saksi-saksi berkenaan dakwaan ini semasa kes pendakwaan dan pembelaan ini hanya dicadangkan untuk pertama kali semasa pembelaan dipanggil. Dalam sebarang hal, hakim perbicaraan tidak menolak dakwaan perayu bahawa dia adalah pemandu teksi sapu tetapi hanya menolak dakwaan pembelaan mengenai kemungkinan seorang penumpang meletakkan beg plastik mengandungi dadah berbahaya tersebut di bawah tempat duduk pemandu (lihat perenggan 15).

(2) Maklumat yang diberikan oleh perayu, tertuduh dalam tahanan, diberikan sebelum beg plastik mengandungi dadah berbahaya tersebut diambil daripada tempat duduk pemandu di mana ia disembunyikan dan diserahkan kepada polis. Ia adalah satu rekod mengenai maklumat yang diberikan oleh perayu di dalam penyataannya sendiri dan pendakwaan telah menjelaskan bahawa mereka memasukkan keterangan tersebut menurut s 27 AK. Dengan mengambilkira kes-kes yang telah diputuskan ia adalah jelas bahawa hakim perbicaraan adalah betul dalam memutuskan bahawa keterangan ini adalah boleh diterima dan oleh itu membentuk sebahagian daripada kes pendakwaan (lihat perenggan 17–19 & 22).

(3) Keterangan di hadapan hakim perbicaraan menunjukkan bahawa perayu adalah secara jelas memiliki dadah berbahaya tersebut dan fakta

ini bererti bahawa dadah berbahaya tersebut berada di dalam jagaan dan kawalannya. Ini akan mencetuskan anggapan statutori pengedaran seperti yang diberikan oleh s 37(da) Akta tersebut. Di dalam keadaan ini hakim perbicaraan adalah betul dalam memanggil perayu untuk memasukkan pembelaannya di akhir kes pihak pendakwaan. Memandangkan perayu gagal untuk menimbulkan keraguan yang munasabah dia telah didapati bersalah dan disabitkan dengan pengedaran. Tidak terdapat alasan untuk mengusik penemuan-penemuan hakim perbicaraan (lihat perenggan 23).]

Notes

For cases on admissibility of statement, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1799–1804.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)

Pitchi Muthu, Re [1970] 2 MLJ 143, HC (refd)

PP v Kanapathy a/l Kupusamy & Anor [2001] 5 MLJ 20; [2001] 1 CLJ 61, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(da), 37A(1)(b), 39B(1)(a), 39B(2)

Evidence Act 1950 s 27, 27(1)

Appeal from: Criminal Trial No 45–03 of 2001 (High Court, Alor Setar)

RSN Rayer (R Nethaji Rayer & Co) for the appellant.

Eddie Yeo Soon Chye (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is the unanimous judgment of the court.

[2] The appellant was charged in the High Court, Alor Setar with an offence of trafficking of dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), to wit, 937.8g of cannabis and punishable under s 39B(2) of the same.

[3] At the end of the trial he was found guilty and convicted and was sentenced to death. The appellant appealed to this court. We had dismissed the appeal and our reasons for doing so follows.

THE PROSECUTION'S CASE

[4] The facts of the case are as follows. On 31 May 2000 at about 10.30pm, acting on information, a group of police personnel led by ASP Mohd Zainal Baharom ('SP3') tailed a Proton Saga motorcar bearing registration No PBR 5368 ('the said motorcar') which was being driven by the appellant within the vicinity of Jalan Tengku Bendahara, Alor Setar. There were no passengers in the said motorcar. They then stopped the said motorcar when it turned into Jalan Taman Tunku Abdul Halim, Alor Setar. SP3 identified himself to the appellant and administered the caution under s 37A(1)(b) of the Act. He then conducted an investigation by first inspecting the identity card of the appellant.

[5] In the course of investigation the appellant took a plastic bag which was kept under the driver's seat and handed it to SP3. Upon examining the plastic bag SP3 found a compressed slab of plant material wrapped in another plastic bag. SP3 also conducted a body search on the appellant and also searched the said motorcar and consequently seized several items found in the said motorcar including a handphone and cash amounting to RM900. He then brought the appellant and the items seized from the appellant including the plastic bag containing the plant material to the Narcotics Department, Ibu Pejabat Polis Kontinjen, Alor Setar ('IPK') where he lodged a police report and prepared a search list with regards to the items seized from the appellant and other items found in the said motorcar. SP3 subsequently handed over the said plastic bag containing the plant material and the other items seized to Chief Inspector Helmi Aris, the investigation officer of the case ('SP5').

[6] In the course of investigation, SP5 handed the said plastic bag containing the plant material to Shaharudin Hasan of the Chemistry Department (SP2) for analysis. SP5 confirmed that the plant material found in the said bag was 937.8g of cannabis as defined under s 2 of the Act ('the said dangerous drugs').

[7] The appellant was subsequently charged in the High Court, Alor Setar with an offence of trafficking of the said dangerous drugs under s 39B(1)(a) of the Act.

[8] In the course of trial, SP3 testified that when he questioned the appellant after he had stopped the said motorcar, he received information from the appellant with regards to the said dangerous drugs. When he

returned to the IPK, he wrote down the information that he received from the appellant ('exh P22'); it read as follows:

> Pada jam lebih kurang 2300 hrs 31 Mei 2000 bertempat di Jalan Utama, Taman Sultan Abd Halim, A/Setar, saya telah membacakan amaran di bawah Sek 37A(1)(b) ADB 1952 (Akta 234) kepada KATHAVARAN A/L MUNISAMY k/p No 490308–02–5015 di dalam Bahasa Malaysia dan difahami oleh beliau. berbunyi:
>
> Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, samada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan.
>
> Soalan: Adakah anda faham dengan apa telah saya bacakan kepada anda.
>
> J: Ya, saya faham.
>
> S: Adakah apa-apa barang salah yang ada bawa didalam kereta ini?
>
> J: Ya, ada.
>
> S: Bolehkah kamu tunjukkan di mana dalam kereta?
>
> J: Ya, di bawah tempat duduk pemandu.
>
> tt
>
> tt
>
> Kathavayaran a/l Munisamy
>
> ASP Mohd Zainal Baharom
>
> k/p 490308–02–5015
>
> G/6491

[9] Upon the application of the learned deputy public prosecutor and with no objection from counsel for the appellant, exh P22 was admitted under s 27 of the Evidence Act 1950 ('EA') and hence formed part of the case for the prosecution.

[10] At the close of the case for the prosecution, the learned trial judge found that the prosecution had made out a prima facie case against the appellant on the charge of trafficking and hence called upon the appellant to enter on his defence.

THE DEFENCE CASE

[11] The appellant elected to give evidence on oath. In his defence the appellant stated that on 31 May 2000, ie, the day of the incident, he was

residing in Kulim. He admitted that the said motorcar belong to him and that he purchased it in June 1999. He claimed that he used the said motorcar as a pirate taxi ('*kereta prebet sapu*') and on the day of the incident he ferried some passengers to Alor Setar. He then said at about 6.30pm on the day of the incident, he ferried four passengers from '*Stesen Bas lama Alor Setar*' to Taman Aman, Anak Bukit. After sending the four passengers to Taman Aman he proceeded to his adopted relative's house, whom he referred to as '*adik angkat*', in Taman Sultan Abdul Halim. When he was about to reach his adopted relative's house, he was stopped by the police. The police officer who stopped him then handcuffed him, searched the said motorcar and took a package from underneath the driver's seat and said '*Ini ganja*'. The police officer showed it to him and he replied '*saya tak tahu*'. He then claimed that the said police officer never questioned him after he was handcuffed. He also claimed that he never showed to the police officer the package that was found under the driver's seat. He further claimed that no caution was ever administered to him. He later clarified that it was on 30 May 2000, ie, the day prior to the day of the incident that he ferried passengers from Kulim to Alor Setar and that he did not return to Kulim on that day, ie, 30 May 2000. He further clarified that the said adopted relative is actually his nephew and that his name is Vijay.

[12] The defence called one witness, namely, Sarawana a/l P Shanmugham (SD2) who testified that on 30 May 2000 the appellant stayed at Vijay's house which was next door to his house. He also said that in May 2000 the appellant was driving a pirate taxi.

CONCLUSION OF THE TRIAL

[13] At the conclusion of the trial, the learned trial judge, after considering all the evidence adduced before him, found that the appellant failed to cast a reasonable doubt and concluded that the prosecution has proved its case beyond reasonable doubt and accordingly found him guilty and convicted him on the charge of trafficking.

THE APPEAL

[14] Before us, learned counsel for the appellant canvassed the following arguments, namely:

(i) the learned trial judge found that others had access to the said motorcar, namely, that on the day of the incident he had carried four passengers; and

(ii) that exh P22 was a cautioned statement and no trial within a trial was held; as such it is inadmissible evidence and it remains inadmissible even if it was admitted without any objection from the defence.

[15] We are of the view that there are no merits with regards to the first issue raised. The claim that the appellant was driving a pirate taxi which would entail him to carry passengers in the said motorcar in the course of such vocation only came about during the defence case. We noted that there was a lack of cross-examination of witnesses during the prosecution's case by the defence touching upon its claim that the appellant was using the said motorcar as a pirate taxi and thus would be ferrying passengers who need his services and consequently suggesting that any of his passengers could have placed the said plastic bag containing the said drugs underneath the driver's seat. This line of defence was only suggested for the first time when defence was called (see *Re Pichi Muthu* [1970] 2 MLJ 143). Be that as it may, the learned trial judge did not dismiss the appellant's claim that he was a pirate taxi driver. He however rejected the defence claim about the possibility of a passenger placing the said plastic bag containing the dangerous drugs under the driver's seat; in relation to this, he said in his grounds of judgment as follows (at pp 102–103 of the appeal record):

> Persoalan seterusnya adakah keterangan tertuduh berjaya menimbulkan keraguan yang munasabah kepada kes pendakwaan bahawa cannabis tersebut berada dalam milikan eksklusif (sic) tertuduh iaitu sebenarnya bungkusan yang berisi cannabis itu ditinggalkan oleh penumpang-penumpang yang menaiki keretanya. Saya berpendapat adalah tidak munasabah untuk mempercayai bahawa bungkusan yang mengandungi cannabis itu ditinggal oleh salah seorang penumpang tersebut. Ini kerana bungkusan tersebut bukanlah benda yang kecil saiznya untuk penumpang tersebut terlepas pandang. Bungkusan itu pula berada dalam kereta di depan penumpang itu dan bukan berada dalam but kereta. Cannabis itu adalah barang yang bukan senang untuk diperolehi dan mempunyai nilai pasaran yang tinggi jadi tidak munasabah bagi mana-mana orang yang memilikinya dengan begitu mudah meninggalkan bungkusan itu begitu sahaja.

We would agree with the views of the learned trial judge referred to above.

[16] The second issue raised by counsel for the appellant relates to exh P22 which was introduced by the prosecution pursuant to s 27(1) of the EA. Counsel argued that exh P22 is a cautioned statement and hence is inadmissible as no trial within a trial was held. Section 27(1) of the EA reads:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[17] We cannot find any merits with regards to the second issue raised. Exhibit P22 is not cautioned statement within the contemplation of the Act. Before the learned trial judge the prosecution has made it very clear that they were introducing exh P22 pursuant to s 27 of the EA. Exhibit P22 is evidence of information given by the appellant who is an accused in custody and that information was given before the said plastic bag containing the said dangerous drugs was taken from the place where it was concealed, ie, under the driver's seat and consequently handed to the police. It is a record of the information given by the appellant in his own statement. Section 27 of the EA has been dealt with at length by Nik Hashim J (as he then was) in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* [2001] 5 MLJ 20; [2001] 1 CLJ 61. His Lordship said (at pp 28–29 of MLJ, 69–70 of CLJ):

> It is clear from authorities that for evidence to be admissible under s 27 of the EA 1950, there must first be evidence of information given by an accused in custody and that information must be given before the discovery of the fact (see *Public Prosecutor v Basri bin Salihin* [1994] 2 MLJ 476; [1993] 1 CLJ 420) and such information must relate to the fact discovered. To constitute 'information' under the section, the information must come from the accused and nobody else. The information must be the accused's own statement in his own language (see *Sarkar on Evidence* (15th Ed, 1999) at pp 550–551).
>
> In *Public Prosecutor v Toh Ah Keat* [1977] 2 MLJ 87, Hashim Yeop A Sani (as he then was) at p 89 said:
>
> > Section 27 of the Evidence Act however deals with a very special type of statement which even if self-incriminatory is nonetheless admissible under that section provided that the *conditions prescribed are strictly complied with*.
> >
> > (Emphasis added.)
>
> In *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356 (SC) Gunn Chit Tuan SCJ said (at p 358) that:
>
> > [It] must be borne in mind that for s 27 of the Evidence Act to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered ...
>
> Further down, he continued:
>
> > It must also be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, *it includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge*.
> >
> > (Emphasis added.)

In *Public Prosecutor v Khoo Boo Hock & Anor* [1990] 1 CLJ 971, Edgar Joseph Jr J (as he then was) held:

(1) The prosecution must prove beyond reasonable doubt that the actual questions put to the accused in order to find out precisely what information was intended to be conveyed by the accused, which led to the discovery of the drugs.

(2) A contemporary record of what really passed between the police and accused was of particular importance.

And in *Public Prosecutor v Tai Mei Yuen* [1990] 1 CLJ 1208, the same learned judge held:

(1) It is trite law that although there is no legal requirement that statement under s 27 of the Evidence Act must be taken down in writing, prudence demands that this is highly desirable.

[18] Another case relating to s 27 of the EA is *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389. In delivering the decision of the Federal Court, Augustine Paul JCA (as he then was) said (at pp 407–410):

What therefore remains for consideration is whether the High Court ought to have excluded the information supplied by the accused under s 27 in the exercise of its discretion. As stated earlier the burden of proof on this issue is on the defence. The very evidence that is now being objected to was admitted by the High Court without any objection from the defence. The police officer to whom the information was supplied was not cross-examined on this issue when he gave evidence. In the circumstances the evidence of the accused that he did not supply the information in question has very little value with the result that there is insufficient material before the court to exercise the discretion in favour of the accused.

... The law relating to the admissibility of such information was considered by the High Court in *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176 at pp 187–188:

The section provides that '... so much of such information ... as relates distinctly to the fact thereby discovered, may be proved'. It follows that the information that is admissible must relate distinctly to the fact discovered. It was made abundantly clear by the Privy Council *Pulukuri Kotayya & Ors* that it is fallacious to treat the 'fact discovered' as equivalent to the object produced; the fact discovered embraces the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The discovery must be the direct cause of the information (see *Jaffer Husain Dastagir v State of Maharashtra* AIR 1970 SC 1934). Thus the information must relate to the place of concealment of the object and the accused's knowledge of it. What is admissible is therefore information supplied by the accused which relates to the exact location of the object and its subsequent discovery.

Since the information supplied by the accused must lead to the discovery of the object it means that the discovery must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information supplied by the accused (see *Thimma v State of Mysore* AIR 1971 SC 1871; *Joy v CI of Police* [1989] 1 KLT 443 (Ker)). Thus the discovery must be made by virtue of and exclusively as a result of information given by the accused (see *Ramjan Das v State* (1988) 1 Crimes 843). In this regard Nik Hashim J said in *Public Prosecutor v Kanapathy a/l Kupusamy* [2001] 5 MLJ 20 at p 28:

> To constitute 'information' under the section, the information must come from the accused and nobody else.

If the police have prior knowledge of the information supplied by the accused, obviously the subsequent discovery will be based on such prior knowledge and not on that of the accused. It will thus render the information supplied by the accused inadmissible as it will not be not be the cause of the discovery. It must be remembered that s 27 is based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information is true, and accordingly can be safely allowed to be given in evidence (see *Pulukuri Kotayya & Ors*). It follows that prior knowledge which will make s 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery will still be the information supplied by the accused and not the prior knowledge of the police. In that event, the information supplied by the accused will be inadmissible as the information that the police have will not amount to prior knowledge. The corollary is that information that the accused has drugs or has hidden the drugs without any further information on their exact location will not amount to prior knowledge. In support, I refer to *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 where Gopal Sri Ram JCA said at p 360:

> If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply.

The 'whereabouts' of an article is a reference to its exact place of location. In further support, I refer to the Indian Supreme Court case of *Aber Raja Khima v State of Saurashtra* AIR 1956 SC 217 where it was held that discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible if the police already knew where they were hidden ...

[19] With the above authorities in the forefront of our minds in relation to exh P22 and the evidence before the learned judge, we came to the view that the learned trial judge was correct in ruling that it was admissible. The evidence before the court showed that in the afternoon of the day of the incident, SP3 received information to the effect that an Indian man could be carrying drugs in the said motorcar. After stopping the said motorcar he arrested the appellant and administered the caution under the Act. He then

asked the appellant whether he was carrying anything illegal. The appellant answered in the affirmative. Upon being asked whether he can show where it was kept in the said motorcar, the appellant answered in the affirmative and said that it was kept under the driver's seat. The appellant then took the said plastic bag containing the said dangerous drugs concealed under the driver's seat and handed it to SP3. As the place where the incident took place was dark, SP3 immediately upon returning to his office at the IPK put down in writing the information given to him by the appellant. What can be gleaned from the above facts are the following:

(i) the information to SP3 regarding the whereabouts of the said dangerous drugs was given by the appellant who was an accused in custody at that material time;

(ii) SP3 had no prior knowledge of the place where the said dangerous drugs were concealed when he questioned the appellant; and

(iii) the information related to the place of concealment of the said dangerous drugs and the appellant's knowledge of it.

[20] In his defence the appellant denied that he gave any information about the said dangerous drugs to SP3 and insisted that he had no knowledge of the plastic bag containing the said dangerous drugs which he insisted was found by the police underneath the driver's seat. This was what he said (at pp 57–58 of the appeal record):

> Apabila saya sampai dekat rumah adik saya saya ditahan oleh orang. Selepas dia tahan saya, dia kata dia polis dan dia gari saya di belakang, check kereta itu dan dia ambil keluar satu bungkusan dari bawah tempat duduk pemandu. Dia buka bungkusan itu dan dia kata 'Ini ganja'. Dia tunjuk kepada saya dan saya kata saya tak tahu.
>
> Selepas saya digari dia tidak ada soal saya. Saya tidak menunjuk ganja itu kepada polls.
>
> Tempat kereta saya ditahan adalah gelap. Saya tak pasti samada ada lampu atau tidak. Polis tidak ada memberi saya apa-apa amaran sebelum menjumpai barang itu. Polis terus ambil barang itu dan bukan terus periksa seluruh kereta dulu. Saya tidak ada memeriksa kereta saya kerana tak sempat. Pada hari itu selain daripada empat penumpang itu saya ada ambil penumpang lain pada tengah hari. Saya datang dari Kulim ke Alor Setar kerana saya membawa penumpang dari Kulim ke Alor Setar pada 30 Mei 2000 iaitu satu hari sebelum kena tangkap. Selepas itu saya tidak balik ke Kulim.
>
> Dadah yang dirampas oleh polis itu bukan saya punya. Saya tidak tahu macamana dadah itu berada di dalam kereta saya. Saya tidak ada tunjuk kepada polis tempat dadah itu diletak.

[21] The learned trial judge did not accept the appellant's defence that he never supplied the information about the said dangerous drugs to SP3 and that he had no knowledge of the said dangerous drugs that was placed under the driver's seat of the said motorcar. This was what he said in his grounds of judgment (at p 103 of the appeal record):

> Saya juga menolak keterangan tertuduh bahawa dia tidak memberi maklumat kepada SP3 seperti dalam eks P22. Pada pendapat saya tidak ada sebab untuk SP3 mereka-rekakan cerita tentang eks P22. SP3 cuma menjalankan tugasnya dan SP3 tidak mengenali tertuduh sebelum itu. Saya berpuashati maklumat tersebut diberi oleh tertuduh kepada SP3. Eksibit P22 ditandatangan oleh tertuduh. Jadi bagaimana dia mengatakan dia tidak memberi maklumat tersebut kepada SP3?
>
> Saya juga berpendapat maklumat tersebut boleh diterima di bawah s 27 Akta Keterangan setelah menimbang hujah yang diberikan oleh peguambela tertuduh. Mengenai hujah peguambela tertuduh bahawa dadah tersebut tidak berada di tempat tersembunyi dalam kereta tersebut maka dengan demikian s 27 Akta Keterangan tidak terpakai saya berpendapat tiada merit dalam hujah ini. Sama ada bungkusan tersebut disembunyikan dalam kereta tersebut perlu dilihat pada fakta kes ini. Dalam kes ini bungkusan tersebut dijumpai di bawah tempat duduk pemandu. Tempat tersebut bukannya dibuat untuk penumpang atau sesiapa pun menyimpan barang. Jadi jika barang diletak di tempat tersebut saya berpendapat barang itu disembunyikan di situ kerana orang tidak akan menyangka ada barang akan diletak di tempat sedemikian.

[22] We were of the unanimous view that the learned trial judge in the instant appeal was correct in ruling that exh P22 was admissible and hence formed part of the prosecution's case.

[23] The evidence before the learned trial judge showed that the appellant was clearly in possession of the said dangerous drugs and this fact denotes that the said dangerous drugs were in his custody and control. He clearly had knowledge of the said dangerous drugs. The said dangerous drugs, ie, 937.8g of cannabis was in excess of 200g as provided under s 37(da)(vi) of the Act. This would trigger the statutory presumption of trafficking as provided in s 37(da) of the Act. Premised upon these facts, the learned trial judge was correct in finding that a prima facie case had been made out against the appellant at the conclusion of the case for the prosecution on the offence charged and calling upon him to enter on his defence. The defence was a mere denial. The learned trial judge found that the appellant failed to cast a reasonable doubt and after considering all the evidence adduced decided that the prosecution had proved its case beyond reasonable doubt and hence found him guilty and convicted him on the charge of trafficking of the said dangerous drugs. We find no reason to disturb the findings of the learned judge.

A **[24]** For the reasons aforesaid, we dismissed the appeal. The conviction and sentence imposed by the High Court were affirmed.

Appeal dismissed. High Court decision affirmed.

B

Reported by K Nesan

C

D

E

F

G

H

I